Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,

Appellant,

—*vs.*—

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

JURISDICTIONAL STATEMENT FILED DECEMBER 22, 1978
PROBABLE JURISDICTION NOTED MARCH 26, 1979

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CHRONOLOGICAL LIST OF RELEVANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD, AND ORDERS ENTERED.

March 1, 1976—Search warrant issued.

March 2, 1976—Information filed.

March 25, 1976—Preliminary hearing held; probable cause found.

April 13, 1976—Indictment returned by the Grand Jury of Kane County, Illinois charging appellant with unlawful possession of a controlled substance.

April 20, 1976—Motion to suppress evidence filed by appellant.

April 23, 1976—Appellant arraigned; pleads not guilty.

May 6, 1976—Hearing on motion to suppress; motion denied.

May 28, 1976—Bench trial held; appellant found guilty as charged.

June 28, 1976—Sentencing hearing held; appellant sentenced to twenty-four (24) month term of probation.

June 30, 1976—Notice of appeal filed.

February 9, 1978—Opinion of the Appellate Court of Illinois, Second Judicial District.

April 7, 1978—Denial of Petition for Rehearing and Certificate of Importance by Appellate Court.

September 28, 1978—Petition for Leave to Appeal denied by the Supreme Court of Illinois.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

COMPLAINT FOR SEARCH WARRANT
SIGNED MARCH 1, 1976

The undersigned, Complainant herein, on oath (or by affirmation) says that he has reasonable grounds to believe that on or about February 29, 1976, in or about 79 S. LaSalle, Autora, Kane County, Illinois the following offenses were committed in violation of the cited provisions of the Illinois Revised Statutes, as amended, to-wit:

Possession of a Controlled Substance, Ch. 56½, Sec. 1401

Complainant states that he has reasonable grounds to believe that a search of the following place(s), thing(s), or persons(s), to-wit: (DESCRIBE PARTICULARLY)

79 S. LaSalle, Aurora, Illinois, the Aurora Tap Tavern which is the first floor of a two story brick structure with green wood trim. The entrance is a green wood frame door with an air conditioner installed above it. There is a "Miller High Life" sign in the front window and a "Schlitz" sign hanging outside the front door. Also the person of "Greg" the bartender, a male white with blondish hair, appx. 25 years.

will effectuate the seizure of the following described instrument(s), article(s), or thing(s) which have been used in the commission of, or which may constitute evidence of the aforesaid offense, to-wit: (DESCRIBED THE THINGS, ARTICLES, ETC. TO BE SEIZED)

Heroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances.

Complainant states that the facts upon which this Complaint is based are as follows: (SET FORTH THE FACTS LEADING TO THE REQUEST FOR ISSUANCE OF SEARCH WARRANT)

1. I, William Doster am a Special Agent employed by the Illinois Bureau of Investigation and have been so employed for the past six years. For the past four years I have been specifically assigned to the investigation of narcotic cases.

2. On March 1, 1976 I spoke with an informant who is known to me to be reliable in that on nine different occasions he has given me information which has resulted in nine arrests, four convictions and nine seizures. Also he has given me information on at least twenty-five other occasions which I have proven to be accurate through independent investigation. All information provided within past 12 months.

3. The informant related to me that over the weekend of 28 and 29 February he was in the tavern described and observed fifteen to twenty-five tin-foil packets on the person of the bartender "Greg" and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on "Greg" and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.

4. The informant advised me that over the weekend of 28 and 29 February he had a conversation with "Greg" and was advised that "Greg" would have heroin for sale on Monday March 1, 1976. This conversation took place in the tavern described.

Complainant requests the issuance of a Search Warrant.

/s/ _____
WILLIAM DOSTER
Complainant

/s/ _____
JAMES W. CADWELL
Judge

Signed and sworn to before me March 1, 1976.

GERRY L. DONDANVILLE
State's Attorney of Kane County
404 County Courthouse
Geneva, Illinois 60134
Phone: 312/232-2400

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

SEARCH WARRANT
ISSUED MARCH 1, 1976

of JAMES W. CADWELL, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

TO ANY PEACE OFFICER OF THE STATE OF ILLINOIS, GREETING:

On this Day, William Doster, Complainant has signed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause and I therefore command that the following person or place:

79 S. LaSalle, Aurora, Illinois, which is called the Aurora Tap Tavern, the first floor of a two story brick structure with green wood trim. The entrance is a green wood frame door with an air-conditioner installed above it. There is a "Miller High Life" sign in front window, and a "Schlitz" sign hanging outside the front door. Also the person of "Greg", the bartender, a male white with blondish hair appx. 25 years.

be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of possession of a controlled substance be seized therefrom:

Heroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances.

I further command that a return and inventory of anything so seized shall be made without unnecessary delay before me or before any Court of competent jurisdiction.

/s/ _____
JAMES W. CADWELL
Judge

Time and date of issuance: 2:43 p.m., March 1, 1976

RETURN

(To be completed by officer executing search warrant)

I have duly executed the Search Warrant on the reverse hereof, by conducting a search of the therein described places(s), thing(s), or person(s), on March 1, 1976.

At the time of said Search (mark box applicable), a copy of this Search Warrant was:

Left with Betty Miller the person(s) from whom certain article(s), instrument(s), or thing(s) were seized.

Said Search Warrant was executed at 79 S. LaSalle 4:10 p.m. on said date.

Following is an inventory of items seized in the execution of said Search Warrant. (Attach additional sheets if additional space is required).

Six Tin Foil Packets
One Baggie With Green Plant-Like Substance
Hypodermic Needles
One Baggie With Green Plant-Like Substance
One Spoon
$7.00 U.S.C.
One Glass
Numerous Pull Tab Tickets
Several Packets Fireworks

Signed and sworn to before
3/2/76.

/s/ _____
JEROME JOHNSON
Officer

/s/ _____
JAMES W. CADWELL
Judge

GERRY L. DONDANVILLE
State's Attorney of Kane County
404 County Courthouse
Geneva, Illinois 60134
Phone: 312/232-2400

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

PRELIMINARY HEARING

TRANSCRIPT OF PROCEEDINGS
CONDUCTED MARCH 25, 1976

PRESENT: For the People of the State of Illinois:

GERRY L. DONDANVILLE, STATE'S ATTORNEY,

by

PATRICIA PIPER, ASSISTANT STATE'S ATTORNEY

and

THOMAS HOGAN, ASSISTANT STATE'S ATTORNEY

For the Defendant

HERBERT HILL, ATTORNEY AT LAW

[PH-2] MS. PIPER: Ybarra. Your Honor, this is case number 76-CF-9101. The defendant is charged with unlawful possession of a controlled substance. I believe it's been set for preliminary hearing this afternoon.

MR. HILL: We are prepared, your Honor.

THE COURT: Okay, set it at 1:30 this afternoon.

(Whereupon the case was passed until the afternoon, at which time the following proceedings were had.)

MR. HOGAN: Ventura Ybarra.

MR. HILL: Defense is ready.

THE COURT: Is the State ready?

MR. HOGAN: We're ready.

Whereupon,

JEROME JOHNSON,

called as a witness on behalf of the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOGAN:

Q Would you state your name, please?

A Jerome Johnson.

Q Your occupation?

A Special Agent with the Illinois Bureau of Investigation.

[PH-3] Q Mr. Johnson, were you on duty in that capacity on March 1, 1976?

A Yes, I was.

Q At approximately 4:25 p.m. on that date did you have an occasion to assist in the execution of a search warrant?

A Yes, I did.

Q Where did you assist in that execution of the search warrant?

A The Aurora Tap at 79 South LaSalle in Aurora.

Q Is that in Kane County?

A Yes, it was.

Q Who else was with you?

A Special Agent William Doster, Special Agents Moraitis, Santercier, and a few officers from the Aurora Police Department.

Q What happened when you went into the Aurora Tap?

A I went into the Aurora Tap. We announced our office; informed them that we were executing—that we had a search warrant for the premises. We then advised all patrons to rise in their seats for a cursory search for weapons. At that time Special Agent Doster ordered me to search one Ybarra for a controlled substance.

[PH-4] Q Did you do so?

A Yes, I did.

Q How did you conduct the search on Mr. Ybarra?

A Had Mr. Ybarra put his hands on the bar, and then I persisted to pat him down.

Q What happened during the pat down, if anything?

A During the pat down, I felt some objects that I felt to be heroin and I—

MR. HILL: I object, your Honor.
THE COURT: Objection will be sustained as to the words that I felt to be heroin.

BY MR. HOGAN:

Q You felt some objects, right?
A Right.
Q Where?
A In his right front pocket.
Q And then what did you do?
A I proceeded to take them from his pocket.
Q Okay. And what were they?
A They were tin foil packets which I opened up and examined and the contents were brown substance.
Q How many packets were there?
A As I remember correct, if my memory serves me correctly, there were five.
[PH-5] Q Did you open all five of them?
A Yes, I did.
Q And they were all the same type of substance inside?
A Correct.
Q Then what did you do?
A I advised Mr. Ybarra of his rights, placed him under arrest, and members of the Aurora Police Department transported him to the Aurora Police Station.
Q What did you do with these packets?
A I took the packets upstairs at the Aurora Police Station and conducted a field test.
Q And then what did you do with the packets?
A After the field test, which proved to be positive—
MR. HILL: Objection, your Honor; he asked what he did, not what the results were.
THE COURT: Sustained.

BY MR. HOGAN:

Q What did you do with the packets?
A I processed them.
Q What do you mean by processed them?

A I put them into Illinois Bureau of Investigation evidence envelope, put the proper heading on it as to exhibit number, what I thought it was, and transported it to the Joliet Bureau of Identification.
[PH-6] Q For what purpose?
A For analysis.
Q Did you ever receive a report back regarding the analysis?
A Yes, I did.
Q And do you know what that report said?
MR. HILL: Objection, your Honor; he's not the proper witness to testify as to what the report said.
THE COURT: Objection will be overruled. Is there a written report here?
MR. HOGAN: I have not submitted one for evidence, no.
THE COURT: I'm—if he's going to be testifying to what he read on a written report and you have that written report here, I'd like to have it produced. I'll let hearsay go in because this is a preliminary hearing, because if he's going to be testifying from a written document you have in your presence, I want it to be produced to let Mr. Hill look at it.
MR. HOGAN: I'll be very happy to show it to Mr. Hill.

BY MR. HOGAN:

[PH-7] Q Did you read the analysis report?
A Yes, I did.
Q Would you tell the Court what it said?
MR. HILL: The document speaks for itself.
THE COURT: I'll allow him to say what it says as long as they're going to allow you to see it. This is just a preliminary hearing.
THE WITNESS: The document stated that the substance was heroin.

BY MR. HOGAN:

Q Was the weight under or over 30 grams?
A Under.

Q Okay. Now, this Mr. Ybarra that you patted down, is he in Court today?
A Yes, he is.
Q Would you point him out for the benefit of the Court?
A The gentleman here with the orange shirt, long hair.
Q Sitting to the right of Mr. Hill?
A That's correct.
MR. HOGAN: Would you let the record reflect that he has identified the defendant in this case. I have no further questions of this witness, your Honor.
THE COURT: Mr. Hill, your witness.
[PH-8] MR. HOGAN: For the record, I will tender to Mr. Hill for purposes of cross examination a copy of Mr. Johnson's report and also a copy of the lab analysis report.

CROSS EXAMINATION

BY MR. HILL:

Q Mr. Johnson, prior to March 1, 1976, did you have occasion to make any or conduct any investigation with respect to the Aurora Tavern?
A Yes.
Q You personally?
A Yes.
Q And I take it that the officers who are also listed in this report might have conducted some investigation of that type, too?
A I can't testify as to that.
Q Did you at any time prior to the first day of March, 1976, observe Mr. Ybarra at that time?
A No.
Q Pardon?
A No.
Q Do you have any knowledge as to whether or not any of the other investigators might have observed him at that time?
[PH-9] A I have no such knowledge.

Q When did you—or strike that. Did you at your request seek a search warrant for those premises?
A No, I did not.
Q Do you know who might have obtained that search warrant?
A Yes, I do.
Q Who?
A Special Agent William Doster.
Q Is he also with the Illinois Bureau of Investigation?
A That's correct.
Q And did he—do you have any personal knowledge as to whether or not he had ever observed Mr. Ybarra at that establishment?
A No, I don't.
Q Do you know whether or not Mr. Ybarra owns that establishment?
A I have no knowledge.
Q Do you have any knowledge as to whether or not Mr. Ybarra works at that establishment?
A No, I don't.
Q And you had never seen him there prior to this date?
A Not to my knowledge.
[PH-10] Q You indicated that there was a general search of all the patrons that were there?
A Correct.
Q Do you have a copy of that search warrant that was obtained?
A I personally? No, not right now.
Q Did you ever observe that search warrant?
A Yes.
Q Did it mention anyone in particular?
MR. HOGAN: Your Honor, I'm going to object to any questions on the search warrant itself. We're not here on the search warrant. We're here on the results of the search warrant.
THE COURT: Sustained.
MR. HILL: Your Honor, this is establishing probable cause for the arrest of this defendant, and if they

are there pursuant to search warrant, I think we ought to know what the search warrant contained.

THE COURT: If you wish to file a motion to suppress based on lack of evidence, that is an issue. That isn't in issue today.

MR. HILL: I would assume, your Honor, that the issue today is probable cause to bind this [PH-11] defendant over to the Grand Jury.

THE COURT: As to whether he possessed heroin at the time, correct.

BY MR. HILL:

Q When you went into this tavern, Mr. Johnson, where did you find Mr. Ybarra?

A I found Mr. Ybarra at the front of the bar near the door—near the entrance.

Q Was he behind the bar?

A In front of the bar.

Q He was sitting in one of the patron seats?

A He was standing.

Q Along with other patrons?

A Correct.

Q And at the time that you observed Mr. Ybarra did you know at that time that he had committed a crime?

A No, I did not.

Q Had he done anything to the best of your knowledge that was a violation of any municipal ordinance?

A Not to my knowledge.

Q Had he done anything to the best of your knowledge at that time that was in violation of the statutes of the State of Illinois?

[PH-12] A Not at that time, no.

Q Was he engaging in any conduct that you could observe at that particular moment that might have been illegal?

A No.

Q And thereafter you conducted the search of his person?

A Correct.

Q Did he at any time prior to your search give you any indication that he was attempting to hide anything?

A No.

Q What was the distance between you and Mr. Ybarra at the time you first observed him?

A Approximately six, seven feet.

Q Did you notice anything about his person that might have given you the indication that he might have been carrying a weapon?

A I didn't hear that.

Q Would you read it back?

(Whereupon the Reporter read the pending question.)

A No.

Q As you observed Mr. Ybarra, were you in fear for [PH-13] any of your personal safety?

A Always on a search warrant.

Q Did he indicate to you in any manner by his objective actions that he had any weapon upon his person?

A That's a—that's an impossible question to answer.

Q Try to answer it.

A There is no way of telling; either he has it or he doesn't.

Q You did not—

A The only way you can find it is to conduct a search.

Q But you did not know that he had a weapon at that time?

A I didn't know that he did and I didn't know that he did not.

Q Where were his hands?

A On the bar.

Q Could you see a weapon on him?

A Did I see a weapon on him? No.

Q How was he dressed?

A Casually: slacks, jacket.

Q You noticed nothing protruding from his jacket?

A No.

Q You noticed nothing protruding from his slacks?

A No.

[PH-14] Q You did not feel that he was about to attack you in any way, did you?

A Attack me? I can't say. I can't answer that. I don't know what his intentions were.

MR. HILL: I have no further questions, your Honor.

MR. HOGAN: I have nothing further, your Honor.

THE COURT: Thank you, Mr. Johnson.

(Whereupon the witness was excused.)

MR. HOGAN: The People would rest.

THE COURT: Does the defense have anything to offer?

MR. HILL: No, we have no witnesses, your Honor.

THE COURT: The State?

MR. HOGAN: No, sir.

MR. HILL: I believe the testimony of the officer with respect to any conduct that Mr. Ybarra might have been engaged in gave the appearance of any criminal activity was negated by the police officer's testimony. And on the basis of that there certainly appears by this record no basis for which anyone from the Illinois Bureau of [PH-15] Investigation or the Aurora Police Department or the County Sheriff's Office might have engaged in any search of his person.

And I suggest to the Court that if there was any basis for a warrant, that the basis for that warrant was applicable probably to the owner of that establishment to which this officer testifies that he was not; that he was a patron there; that he had engaged in no activity that appeared to be criminal.

And I believe on the basis of that conduct, the general search of his person when there is nothing that suggested that his life was in peril or that he was about to commit a crime, in unconstitutional; that the evidence that was taken against him should not be used; that there is no probable cause to submit this thing to the Grand Jury.

MR. HOGAN: I'll stand on the evidence taken.

THE COURT: You know, even though what you say may be true, but you had no objection to the evi-

dence as it went in at the preliminary hearing. That may be the subject of a motion to suppress. It being in the record over no objection of yourself, I feel there is probable cause. The defendant will be held to answer. He is out on bond; his bond will continue.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

v.

VENTURA E. YBARRA, DEFENDANT(S)

BILL OF INDICTMENT

FILED APRIL 13, 1976

GENERAL NUMBER 76 CF 9101

THE GRAND JURY CHARGES THAT on or about March 1, 1976, VENTURA E. YBARRA, committed the offense of UNLAWFUL POSSESSION OF CONTROLLED SUBSTANCE (Cl.3 fel.) in violation of Chapter 56½, Section 1402, of the Illinois Revised Statutes, as amended, in that he did knowingly possess less than 30 grams of a substances [sic] or substances containing Heroin, otherwise than as authorized in the Controlled Substances Act,

All of the foregoing occurred in Kane County, Illinois.

A TRUE BILL

/s/ _____
Foreman of the Grand Jury

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

MOTION TO SUPPRESS EVIDENCE

FILED APRIL 20, 1976

[CAPTION OMITTED IN PRINTING]

Now comes VENTURA E. YBARRA, defendant, by HERBERT HILL his attorney and moves the court, pursuant to the applicable provisions of the Illinois Supreme Court Rules and the Code of Criminal Procedure, for the entry of an order suppressing the tangible things described below as evidence in this cause, and directing that no evidence be heard as to said tangible things or any evidence procured from or by use of said tangible things be heard during the trial of this cause.

In support of his motion defendant alleges and states as follows:

1. That defendant is a resident citizen of the city of Aurora, County of Kane, and State of Illinois.
2. That on or about the 1st day of March, 1976, police officers of the city of Aurora, County of Kane and State of Illinois together with certain investigation agents of the Illinois Bureau of Investigation, namely, Jerome Johnson, without any warrant or process of law respecting defendant, and without any reasonable or probable grounds to believe that the defendant had committed, was committing or was about to commit any act violative of a municipal state or federal statute, and without the consent or permission of defendant, forced defendant to undergo a generalized search of his person, prior to his arrest, as defendant was a patron, lawfully upon the premises of 79 S. LaSalle Street, Aurora, Illinois, (a drinking establishment within said city and commonly known as "The Aurora Tap"), seizing therefrom certain tangible items including the items alleged in the information herein to be a controlled substance reputed to be

Herion [sic] in an amount less than 30 grams, and other items.

All of said tangible items are now in the possession of the Illinois Bureau of Investigation, its supportive agencies or the Office of the State's Attorney of Kane County, Illinois and are being held by them for use in support of the allegation herein contained.

3. That the aforesaid search and seizure was violative of defendant's rights under the *fourth*, *fifth* and *fourteenth amendments* to *the Constitution of the U.S.*, and further violative of defendant's rights under Article II, Sections 2, 6 and 10 of the Constitution of the State of Illinois.

Respectfully submitted,

/s/ _____

HERBERT HILL
Attorney for Defendant,
VENTURA YBARRA

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

ARRAIGNMENT

TRANSCRIPT OF PROCEEDINGS
CONDUCTED APRIL 23, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GARY L. DONDANVILLE
STATE'S ATTORNEY, BY
THOMAS E. HOGAN,
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

* * * *

[ARR.-2] MR. HOGAN: Your Honor, in case number 76 CF 9101, Mr. Ybarra has been charged with the offense of Unlawful Possession of a Controlled Substance, a Class III Felony. If convicted of that charge, he could be sent to the penitentiary for a minimum of one and up to a maximum of ten years. If he were so imprisoned, he would be subject to a three-year period of parole following discharge from prison. And in addition thereto, he may be fined up to the sum of $15,000.

THE COURT: What is your name, please?

VENTURA YBARRA: Ventura E. Ybarra.

THE COURT: And your age?

VENTURA YBARRA: Twenty-four.

THE COURT: You are represented by Attorney Hill?

VENTURA YBARRA: Yes.

THE COURT: Have you received a copy of the Indictment and List of the Grand Jury Witnesses?

MR. HILL: We have been tendered a copy of the Indictment in this case, your Honor. There is no attendant List of Witnesses.

THE COURT: Are you prepared to plea?

MR. HILL: Yes, we are.

THE COURT: What is your plea?

[ARR.-3] MR. HILL: Entering a plea of Not Guilty and demanding Jury trial.

THE COURT: Cause assigned to Judge Krause. Motion date, May 7. Not Guilty plea entered and Jury demand entered. Pre-trial, May 13. Any motions?

MR. HILL: Yes, your Honor. There is pending a Motion to Suppress and I am tendering to the State at this time a Discovery Motion.

THE COURT: All right. Leave granted to file Defendant's Discovery Motion. Delivery made in open Court.

MR. HOGAN: Your Honor, at this time the State would ask to file the original of the People's Omnibus Discovery Motion; serve a copy on Mr. Hill and ask him to acknowledge receipt of the same.

MR. HILL: Defense acknowledges receipt of the Discovery Motion, your Honor.

THE COURT: Leave granted to file People's Omnibus Discovery; service had in open Court on counsel. Pending motions will be heard by the trial judge.

MR. HOGAN: And as far as the discovery motion, we will acknowledge receipt of the Defendant's Discovery Motion. This Defendant is out on bond and we would have no objection to the same bond remaining in full force and effect.

[ARR.-4] THE COURT: Present bond continued. Anything else?

MR. HOGAN: Not on this case.

THE COURT: Next case.

* * * *

(WHICH were all the proceedings had and testimony taken at the hearing of the above-entitled cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

HEARING ON MOTION TO SUPPRESS

TRANSCRIPT OF PROCEEDINGS
CONDUCTED MAY 6, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GARY L. DONDANVILLE
STATE'S ATTORNEY, BY
DONALD C. HUDSON
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

[R-19] MR. HUDSON: Judge, coming before the Court at this time is the case entitled People vs. Ventura, V-e-n-t-u-r-a, E. Ybarra, Y-b-a-r-r-a.

The Defendant in this case 76 CF 9101 has been charged with the Unlawful Possession of a Controlled Substance, a single Count Indictment. The matter comes before you today on the Defendant's Motion to Suppress evidence seized.

Mr. Hill is present here along with the Defendant. I'm prepared to proceed.

MR. HILL: Good afternoon, Your Honor. We are ready to proceed on the Motion. Defendant would call in this respect Investigator Jerome Johnson.

(Witness sworn.)

JEROME JOHNSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HILL:

Q Would you state your name and spell your last name for the Reporter?
A Jerome Johnson, J-o-h-n-s-o-n.
Q What is the nature of your employment?
[R-20] A Illinois Bureau of Investigation.
Q And were you working for the Illinois Bureau of Investigation on or about the 1st day of March, 1976?
A Yes, I was.
Q On that date did you have occasion to be at or near an address in Aurora known as 79 South LaSalle Street?
A I believe so.
Q To the best of your knowledge is that a drinking establishment located within the City of Aurora?
A Yes, it is.
Q And to the best of your knowledge is that establishment open to the public as a drinking establishment?
A I didn't hear the whole question.
Q Is that establishment open to the public as a normal drinking establishment?
A Yes.
Q And it is commonly known as the Aurora Tap?
A That's right.
Q And you had occasion to be there at approximately 4:10 p.m. on that date?
A Day. To the best of my knowledge, yes.
Q Were you there with anyone else?
A Yes.
Q Who were you there with?
[R-21] A Special Agent Doster, Moraitis, Detective Weaver, Lieutenant Williams, and several other uniformed officers from the Aurora Police Department.
Q Now, was Investigator Doster uniformed?
A No.

Q Those individuals that you named, Weaver, Williams and other people from Aurora, were they all uniformed?
A Some of them were.
Q And at that location did you have occasion to participate in the execution of a Search Warrant?
A Yes, I did.
Q And did the Warrant pertain to the premises of 79 South LaSalle Street?
A Yes, it did.
Q Did it also specify any particular individual that you sought to have executed that Warrant against?
A No, it did not.
Q Had you looked at a copy of that Warrant, Officer?
A What are you talking about, before or after?
Q Before.
A Just briefly.
MR. HILL: Will the Court Reporter mark this as Defendant's Exhibit No. 1 for identification?

(Exhibit marked as requested.)

[R-22] BY MR. HILL:

Q I show you what previously was marked as Defendant's Exhibit 1 for identification and identified as a Warrant issued upon the premises at 79 South LaSalle Street in the City of Aurora, which also bears the general file No. 76 MR 2134.
Are you familiar with that document?
A Vaguely, yes.
Q And is there any specificity within this document that identifies any particular individual?
MR. HUDSON: Objection, Your Honor, the document speaks for itself.
THE COURT: Objection sustained.
MR. HILL: Okay.

BY MR. HILL:

Q When you went—
THE COURT: That is identified as the Search Warrant that this alleged situation arose out of?

MR. HUDSON: That's correct.
MR. HILL: You have no objection to the admission of that in evidence?
MR. HUDSON: I have objection. I believe it's part of the Court record at this time.
THE COURT: Not in this case.
[R-23] MR. HUDSON: Not in this?
THE COURT: No. Under the MR.
MR. HUDSON: I'd stipulate that is the document under which he executed the Warrant, but I don't think he should be reading from it. If you want to have it admitted, fine.
MR. HILL: Would you further stipulate this document does not in any way refer to Mr. Ybarra?
THE COURT: The document speaks for itself.
MR. HUDSON: It speaks for itself.
MR. HILL: Fine.

BY MR. HILL:

Q When you went into this establishment—
THE COURT: For the record, it may be admitted, identification stricken.

(Whereupon said exhibit, marked Defendant's Exhibit No. 1, so offered and received in evidence, is made a part hereof:)

* * * *

[R-25] BY MR. HILL:

Q Mr. Johnson, when you arrived at the Aurora Tavern, how many people were there?
A Can't say exactly. Approximately nine to twelve.
Q And did you go there looking for a specific person?
A No.
Q Did you know any of the twelve people that were there?
A No.
Q Had you seen any of those twelve people before?
A No.

Q How was that establishment lighted, Mr. Johnson?
A How is it lighted?
Q Yes.
A You mean in what manner, or bright, low, dim?
Q Where you able to observe the people that were there?
A Yes.
Q Calling your attention specifically to one Ventura Ybarra, do you know approximately where he might have been in relation to where you were when you first entered the tavern?
A Yes.
[R-26] Q Where was he?
A Immediately to my left standing near the pinball machine.
Q Were his hands visible to you?
A Not at that time, no.
Q How was he dressed?
A Very casually. All I can remember, he had on a red and black checkered jacket.
Q And did you notice anything protruding from his jacket?
A No.
Q Did you notice anything protruding from his pants?
A No.
Q Did you notice at that time he had a weapon on his person?
A No.
Q Did he give you any indication he had a weapon on his person?
A No, he did not.
Q Was he standing in an area where all of the other patrons were?
A In the general vicinity, yes.
Q And as you approached him did you order him to [R-27] stand to be searched?
A No.
Q Did you order anyone to stand to be searched?
A Yes.

Q All of the people that were there?
A Right.
Q So that statement was spoken generally to everyone?
A Right.
Q No one in particular?
A No one in particular.
Q At the time you undertook to search Mr. Ybarra, did you know Mr. Ybarra had committed a crime?
A No.
Q Did you know Mr. Ybarra had done anything that was violative of the Ordinances of the City of Aurora?
A No.
Q Or of the State of Illinois?
A No.
Q Or of any Federal Statute?
A No.
Q Or any of the other patrons that were there?
A No.
Q And thereafter you conducted a search of Mr. [R-28] Ybarra's person, is that correct?
A That's correct.
Q He moved—He did not move towards you?
A No.
Q Did he give you any gestures or overt actions indicative of criminal conduct?
A No.
Q And when you placed your hands upon Mr. Ybarra's person did you feel any weapons?
A No.
Q On how many occasions did you search Mr. Ybarra?
A Twice.
Q Twice?
A Right.
Q First time that you went through Mr. Ybarra's person you found nothing upon him, is that correct?
A Correct.
Q And thereafter you searched him again?
A Correct.

Q Now, following the first time did he move from the position that he had been standing?
A Not to my knowledge.
Q Did he give you any gestures as if he was coming towards you?
[R-29] A No.
Q Did he move toward any of the other Officers that were there?
A Not to my knowledge.
Q Did he act in any threatening or insulting manner toward you or the other Officers?
A No, he did not.
Q Did he say anything to you?
A No.
Q Did he say anything to any of the other Officers?
A I can't testify to that.
Q Did you have him in your observation at that time during the course of your search of him?
A Not the whole time, no.
Q Now, after not finding anything on the first occasion that you had patted his person, did you have occasion to do it again?
A That's correct.
Q Approximately how long after the first time did you search him the second time?
A Two, three minutes.
Q And between the time intervening the first search and second search did he come into contact with anyone other than police officers?
[R-30] A I can't testify, I don't know.
Q Prior to the second search did you notice anything on his person that gave you the indication of a weapon?
A None.
Q Now, prior to the second search were his hands visible to you?
A Yes.
Q Did you notice anything in his hands?
A Nothing other than—No, nothing.
Q And thereafter you searched him again?
A Correct.

Q And you removed certain items from his pocket?
A That's correct.
MR. HILL: No further questions.

EXAMINATION

BY MR. HUDSON:

Q Officer—Special Agent Johnson, you indicated you were there at the Aurora Tap pursuant to a Search Warrant, is that correct?
A That's correct.
Q When you entered the Aurora Tap did you announce your office and your purpose for being there?
A That's correct.
[R-31] Q Would you describe the interior of the Aurora Tap as you entered it?
A That's kind of hard. We entered the door, of course, announced our office, what we were there for, advised the people to stay where they were, we were going to make a cursory search for weapons.
And the place is a very dismal, drab, very plain, almost shabby type establishment, and that's the best I can describe it. Real shabby.
Q Was there a bar there?
A Oh, yes.
Q Where was the bar in relation to your position when you first entered the tap?
A To my immediate left.
Q Was Mr. Ybarra visible when you entered the premises?
A Yes.
Q The other patrons, where were they with respect to the bar? Are there any tables in there?
A I can't really say, but all the patrons that were there were seated at the bar, on or near the bar.
Q All seated at the bar other than Mr. Ybarra?
A Yes.
Q Was there anyone near him by the pinball machine [R-32] by the door?
A There were people sitting next to him at the bar.

Q Okay. Was he standing or seated when you first observed him?
A He was standing.
Q Were the other people standing or seated?
A Some were standing, some were sitting.
Q You indicated about what, twelve people in the bar at the time?
A Yes.
Q Do you recall how many entrances and exits there are in that particular establishment?
A One entrance and one exit.
Q Okay. And where was the entrance or exits with respect to where Mr. Ybarra was?
A Ybarra was approximately eight feet away from the main entrance, front entrance.
Q Have you ever participated in the execution of a Search Warrant before?
A Oh, yes.
Q Is it part of your standing procedure to announce your presence and office when you enter?
MR. HILL: I object.
[R-33] THE WITNESS: Correct.
THE COURT: Objection sustained.

BY MR. HUDSON:

Q Officer, when you first arrived what was Mr. Ybarra doing, do you recall?
A If my memory serves me correctly he was standing at the bar drinking a beer.
Q Was he wearing a coat or any outer garments or anything?
A Yes, he had on what looked to be a flannel red and black checkered jacket.
Q Okay. Were there any other—There were other patrons, were they searched also?
A Everyone was searched.
Q Everyone was searched?
A That's right.

Q Okay. I believe you have indicated you conducted two searches of Mr. Ybarra?

A That's correct.

Q Would you describe the first one for us, please? Was it a search, a pat down or what?

A More or less a pat down, cursory search for weapons for our protection.

Q And then how much time elapsed between the [R-34] first and second search?

A Two to three minutes, no more.

Q Did you feel anything during the first search?

MR. HILL: Objection, Your Honor.

THE COURT: Overruled.

BY MR. HUDSON:

Q Did you feel anything during the first search?

A Yes.

Q What did you feel?

A I felt—

Q Describe what you felt.

A I felt a cigarette pack with objects in it.

Q Okay. The other patrons were then searched?

A Yes.

Q Three minutes later you went back to Mr. Ybarra and conducted a search of his pockets specifically, is that correct?

A Yes.

Q Did you have Mr. Ybarra in your constant visual observation from the time you first patted him down until the time you went back?

A Not the whole time, no.

Q So he was out of your observation?

A Yes.

[R-35] Q Did anyone move during the time of the first search of Mr. Ybarra and the second one?

A Not to my knowledge.

MR. HUDSON: I have no further questions, Your Honor.

MR. HILL: I have no questions.

THE COURT: Any other witnesses?

MR. HILL: No further witnesses, Your Honor.

THE COURT: State have any witnesses?

MR. HUDSON: No, Judge, we won't call any witnesses.

THE COURT: All right.

MR. HILL: Your Honor, I don't think that, considering the testimony of the Officer, that there's any question that there's a total and absolute lack of probable cause with respect to this Defendant committing any kind of an offense either before the first—the first search or cursory pat down, as the Officer testified, of the Defendant's person, and prior to the second one. There was certainly nothing that would give the Officer any indication that he ought to—

THE COURT: Do either one have cases?

MR. HUDSON: Yes, I have cases.

MR. HILL: Yes.

THE COURT: Okay. I think the facts are clear that the first search was, as the Officer said, for his own [R-36] protection, and then he felt something, a cigarette pack with objects in it, and he went back to check that.

Now, that's the question. What do your cases say? I don't think we need to argue the facts, I just heard them. I don't think you're going to convince me that I didn't hear something I did hear, or vice versa, but I would be interested in what the cases say about the set of facts.

MR. HILL: Your Honor, under this circumstance, Your Honor, the search would be considered a search in the line of stop and frisk even though the Officers, they're armed with a Warrant, they are there for the purposes of discovering items that are listed within the Search Warrant itself, and to search particularly the person that is named in that Warrant.

I'm calling the Court's attention to the Warrant that has been received into evidence. It's for the—to search the premises of 79 South LaSalle, commonly known as the Aurora Tap, and also the person of Greg the bartender.

Now, there's been no testimony as to whether or not Greg was there. Presumptively he was not. The premises were searched and nowhere in this Search Warrant is there any authority or any basis for which the police officers [R-37] of the City of Aurora or the IBI, or anyone else as far as that matter goes, has the right to search any and all of the patrons that are upon that property.

Now, calling the Court's attention to People vs. Felton, 20 Ill. App. 3d 103, the Court here holds that a search may not precede an arrest and serve as part of its justification.

Furthermore, looks, gestures and movements taken alone are insufficient to constitute probable cause since they may, in fact, be consistent with innocence and they would not provide any kind of a basis for which an arresting officer ought to be engaging in a general search of people upon the premises.

Secondly—or thirdly is that absent any showing of probable cause to search the principles limiting the search itself are those principles applicable to stop and frisk type situations.

Further, going on, three restrictions are placed upon the right of policemen to stop and frisk individuals suspected of criminal acts—and I point the Court's attention first to the fact that the Officer testified that he's not even of the suspicion this Defendant has committed any criminal act—but those three restrictions are, I would go on to say, are that the [R-38] Officer would be justified by specific and articulable facts which, when taken together with reasonable inference from the facts would reasonably warrant an intrusion upon that person.

Here we have nothing specific and nothing articulable about this situation relating to Mr. Ybarra.

Secondly, assuming a valid stop—and we do not have a valid stop in this situation—the limited search of suspects is justified only if a reasonably prudent man in the circumstances would be warranted believing his safety or the safety of others was in danger.

He testified as to the total exclusion of that kind of circumstance.

And third, that the authorized search is confined in scope to an intrusion reasonably designed to discover objects capable of use as weapons.

He testified his first examination of Mr. Ybarra revealed nothing in the nature of a weapon, and if nothing more, a pack of cigarettes with something inside. He has no knowledge of—or that would not, obviously, be in plain view and, therefore, would not fall within the perview of any of the cases relating to a search justified upon that basis.

[R-39] Following this case, Your Honor, there is People vs. Harshbarger, 24 Ill. App. 3d 335.

This is a case of somewhat similar circumstances. Here the police are on premises that belong to a Defendant where they smell what they assume to be burning marijuana. When going into those premises they find three individuals sitting in a living room, and they conduct—on the theory of following the smell of this burning marijuana—a general search of the person of those three people that are there.

The Defendant is found to have possessed marijuana at the time this search was conducted.

The Court here held that an Officer making an arrest without a Warrant must have probable cause to believe that a criminal offense has been committed and that the person to be arrested committed it, and that is, he must have reasonable grounds or some knowledge of facts upon which to base his belief that such a person is guilty of or implicated in a crime, and mere suspicion in the Officer's mind unsupported by such facts is insufficient to support an arrest or a search incident thereto.

The Court goes on to say that while it is necessary in the interest of crime prevention to give [R-40] substantial latitude to police officers in making a warrantless arrest, yet, in doing so, the constitutional guaranty to all citizens to be secure in their persons, houses, property and effects against unreasonable searches and seizures, must be observed.

Now, consistent with this case and the plethora of cases that follow from the Weeks and all other cases relating to the exclusionary rule, the Supreme Court has been somewhat tenacious of its guarding of the rights of an individual to be secure from an unreasonable search.

The Supreme Court has said that there is a basis for a search if that search is founded upon some reasonable relation to the factual situation in which the police officer may be subjecting himself.

Using that same reasoning, and using the same analogy, the Court in People vs. McCarty, 296 N.E. 2d 862 related the following sets of circumstances: Even assuming the case in which Defendant was merely suspected of having some connection—some connection the Court says—with a person recently arrested for possession of marijuana and in which police had no warrant and no reasonable grounds to think that the Defendant had committed any crime, this particular Defendant perhaps [R-41] might have been the proper subject for frisking for weapons as the Defendant was walking in the vicinity of the police station, but the officer, upon determining, by a pat down, that Defendant's coat pocket did not contain a weapon, had no right—articulable fact—had no right to remove any soft plastic bag from the Defendant's pocket. That is substantially much more closer to the factual situation that we have.

Going further, People vs. Ortiz, 305 N.E. 2d 205: Where there is no reasonable ground to believe that a warrant had been issued for the Defendant in Illinois or any other jurisdiction, and there was no warrant, no reason to believe that the Defendant was committing or had committed any offense, and that there was no evidence that there was any reasonable grounds for any arrest, or even a stop and frisk, before attempted search, any warrantless search or arrest of that Defendant is absolutely invalid.

In People vs. Cassell, 243 N.E. 2d 363, in a hearing on a motion to suppress evidence allegedly seized in an illegal search and seizure, the Defendant's evidence that the police officer had no Warrant, and that the Defendant was doing nothing unusual when the police officers stopped him, makes a prima facie case [R-42] that the police officers lacked probable cause for the arrest or subsequent search.

The cases that follow are similar in import.

I believe the State will present to the Court the fact that there is an existence of Statute that says that a police officer—

THE COURT: Why wouldn't the State do it then? Are you going to argue for them?

MR. HILL: No, I'd want to say something in response to that Statute.

THE COURT: You'll have an opportunity to.

MR. HILL: Then I would accede to the State.

MR. HUDSON: Judge, if Mr. Hill has alluded to—First of all, I think the cases he has cited are not in point. We're talking about a case in which the police are at the Aurora Tap pursuant to a Search Warrant, which Mr. Hill has himself moved to have admitted into evidence.

THE COURT: Can I see the Search Warrant?

(Document tendered.)

MR. HUDSON: That has not been challenged in this case, as Your Honor knows. And he has not mentioned—or has glossed over certain statutory provisions set forth in the Criminal Code which outline the police officers authority when they are present on the premises pursuant [R-43] to a Search Warrant, and I specifically call the Court's attention to Section 108-9 of the Illinois Criminal Code dealing with an officer's right to detain and search persons on the premises when a Search Warrant is being executed.

I cite to the Court that section which says:

> "In the execution of the Warrant the person executing the same may reasonably detain to search any person in the place at the time: (a) To protect himself from attack, or (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the Warrant."

Mr. Hill also mentioned something interesting. He says the police were there to search for certain items named in the Warrant, namely, heroin, contraband and other things.

I would cite to the Court the case of People vs. Pugh, 69 Ill. App. 2d 312; 217 N.E. 2d 557, a 1966 case which is the first case to construe the language and import of the section I have cited, and is still good law, I have shepardised it and it's the leading case.

In this case the facts are beyond what we have here. The police searched an apartment in Chicago. Officers [R-44] were admitted into the apartment, they identified themselves as police officers, showed the Search Warrant to Jessie Pugh, who became one of the Defendants, who lived there. They began a search of the apartment. About fifteen minutes later Raymond Pugh, the other Defendant, rang the doorbell, and at the direction of an Officer was admitted to the apartment.

He was then searched, and 42 foil packets containing heroin were removed from his pants pocket, and he was subsequently arrested. He thereupon made a motion to suppress to the Trial Court which was denied, and the Court says:

> "In support of his motion to suppress the narcotics removed from his person when he entered the apartment, the other Defendant, Raymond Pugh argues that he was first searched and then arrested without probable cause."

I think that contention is analogous to what Mr. Hill is claiming here. And the Court then cites the section I have cited, and they state:

> "We feel that under the same rationale as set forth in the Statute the police while engaged in the search had reasonable grounds to search Raymond Pugh as well. We agree with the [R-45] State that the execution of Search Warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the Defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search."

Thereupon they affirmed the conviction and upheld the search.

To put it another way, Judge, I think the sections say when the police officers are executing a Search Warrant, the people who are there are also part of the premises. It's quite possible they could have on them articles and things named in the Search Warrant, and as the Officer testified he did pat down the Defendant, he felt tinfoil packages in there, and they have—

THE COURT: He said he felt an object.

MR. HUDSON: Yes. They have a right to seize objects pursuant to the Search Warrant. I think the case—it's been cited previously, if items or materials to be there could be disposed of the police have a right to search for the specific item. The people are there. They don't need [R-46] probable cause. That's not what we're talking about, I agree. There isn't probable cause to search. This isn't the case. We're talking about a statutory ritual of the police authority set forth. I think the cases say they have a right to do so.

MR. HILL: As far as the Pugh case is concerned, Your Honor, I would like to point out that that case dealt with a search that was being conducted pursuant to a Warrant of private residential property, and it is certainly distinguishable from the facts we have here.

THE COURT: Do you have any case where that's been distinguished though?

MR. HILL: No. There are no distinguishing cases from that, that is the only—

THE COURT: In your mind you feel that distinguishes it?

MR. HILL: Yes. That is the only case that is decided in the State of Illinois that even bears any reasonable attempt to make an interpretation of that Statute.

MR. HUDSON: I can debate that, but I'm not going to argue that. I have other cases.

MR. HILL: It indicates, Your Honor, in this instance we have the police conducting a search upon private [R-47] property and an individual coming upon that property who is related to the Defendant who was the subject matter—one of the Defendants that is—who is the subject matter of the Search Warrant being issued. There perhaps it might be distinguishable in that there is some connection with the property, and furthermore, it may be distinguishable upon the fact it is being issued upon private residential property as opposed to public property.

The instance we have, the Warrant being applied to the Aurora Tavern, is analogous to a situation where, pursuant to some order of the Court, if we assume that a Warrant may go out for the search or the conduct of the search of property located at Highway 65 and 59, commonly known as Marshall Field, the first floor of that property, and specifically the person themselves, clerk, does that in and of itself, the issuance of that Warrant specifying that particular property, justify the police have any nature to search any and all patrons upon that property? I say that is absolutely absurd and I do not think it is the spirit of the Statute to grant that kind of unlimited authority to the police to conduct that kind of general investigation.

And even if they were to have that right, Your Honor, I would believe that pursuant to the Officer's [R-48] testimony he says he conducted a pat down of the Defendant and he found nothing, but he did feel some object that he could not see and he did not have knowledge of, and he has no right to pry, pursuant to a violation of the Fourth Amendment, at that point into what the contents of that package was as long as it was not anything that was going to be potently harmful or dangerous to him or anyone else that perhaps might have been upon the property.

I don't think it's within the perview of that section to give that wide of a latitude. Are we to assume further

that a Warrant issued to conduct a search on the premises commonly known as the Fox Valley Restaurant will give the police the right to search everyone that is there? I don't think that is the spirit in which that particular section was written, and I don't think that there are any cases that would justify that point. That is what we have. That's distinguishable from Pugh.

And I think that as far as that goes, the constitutionality of the section that the State relies upon is certainly at issue, and I think in that respect there are numerous other authorities that relate this fact.

Professor LaFave of the University of Illinois Law Forum in a 1966 publication, following the passage of [R-49] the section that the State is referring to, reflects the fact that the constitutionality of this section is suspect at most. And this article, I might point out to the Court, has been cited with authority by every major law honorarium in the country, including Yale, Harvard, Dartmouth, University of Illinois, et cetera. This article was reported at page 266, Volume 1966 of the Illinois Law Review.

The Court here—the article here attacks—perhaps questions the constitutional validity of the statute that is written on the basis of United States vs. DiRi, cited as 68 Sup. Ct. 222, in which the author discusses that:

> "The constitutionality of the above statute remains in serious doubt because of the attitude of the Supreme Court as expressed in United States vs. DiRi. There the Government claimed that search of a passenger in an automobile was justified as incident to the right to search the vehicle without warrant upon a showing of probable cause."

The Court here holds that:

> "The Government says it would not contend that, armed with a search warrant for a residence [R-50] only, it could search all persons found in it."

an admission on behalf of the Government.

> "But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued."

Therefore, by analogy, the Court goes on reason that if the Government accedes the fact that it does not have the right to go so far as to search the guests in the house on this theory then it certainly would have no right to search of the people in the automobile.

And the other discussion that:

> "The extent to which the Illinois statute may be reconciled with the views expressed in DiRi will depend upon the interpretation which is given the statute and upon the application of DiRi to somewhat different facts. Narrowly read, the language quoted above may be taken to mean that the mere status of 'guest' at the place which may lawfully be searched is not [R-51] enough, but that possibly someone with a closer connection with that place might be searched. Such an interpretation might be given to the Illinois statute, although nothing on the face of the statute seems to compel this result. It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that under some circumstances a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action."

And here we have nothing articulable by any stretch of the imagination that justifies the Officer of any search other than a cursory search and following the cursory search he finds nothing.

We submit to the Court that having gone as far as he did, he had no right to proceed any further, and we refer the Court to the cases that were previously cited as authority for that proposition, and ask the Court respectfully to suppress the evidence obtained from Mr. Ybarra as a result of the search that was conducted [R-52] on the 1st of March, 1976.

THE COURT: Let me see your case.

MR. HUDSON: This second case. In response to Mr. Hill's—

THE COURT: You don't have any response.

MR. HUDSON: I realize that. I thought the Court might want to consider two cases. I won't comment on them.

THE COURT: This case was a gas station? (Indicating.)

MR. HUDSON: Right, public place.

THE COURT: I think that's the key to the whole thing. First of all, not to keep anyone in suspense, I'll deny the motion to suppress for the following reasons: I feel it was made pursuant to statute. Mr. LaFave—or Professor LaFave's doubts about it seem to have been resolved by at least two cases. Granted both of them are Appellate Court cases, they might well still—could be reversed either in the State or Federal systems, but at least for the time being I would accept them as being the law.

I would make the finding of fact that the search for weapons was conducted and that search was under Section (b): To prevent the disposal or concealment of any instrument, article or things described in the Search [R-53] Warrant.

The Search Warrant has not been in any way challenged, and, indeed, stipulated to, and heroin was one of the items. So, it gets to the reasonableness.

It might well not be reasonable to search 350 people on the first floor of Marshall Field, but we're talking about, by description, a rather small tavern. A Search Warrant has been issued pursuant to the fact that it is known that there are activities going on there, and these

are the—might well be some of the concealment of the articles or things particularly described in the Search Warrant. So, I feel under that section it qualifies as a lawful search, and further, that the Federal law doesn't pertain to any Statute. Evidently Federal authorities at this time do not have a similar Statute. And also, as I say, LaFave's points are not well founded because here are two cases. (Indicating.)

LaFave may in the end be right, but at this point in time he's not according to these cases. All right.

MR. HUDSON: Thank you, Judge.

THE COURT: So, where do we go from here?

MR. HILL: Well, if the Defendant—are we off the record?

[R-54] THE COURT: Off the record.

(Which were all of the proceedings had at the hearing in said cause.)

IN THE CIRCUIT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF,

v.

VENTURA E. YBARRA, DEFENDANT

ORDER

ENTERED MAY 6, 1976

This matter having come on before the Court on the defendant's motion to suppress the physical evidence seized in this cause; the Court having heard all of the evidence presented; the arguments of counsel and being fully advised in the premises; and based upon findings of fact and conclusions of law stated in the record;

The Court being fully advised in the premises:

It is hereby ordered that:

The defendant's motion to suppress the evidence seized in this cause be and is hereby denied in toto.

/s/ _____

JOHN A. KRAUSE, JUDGE

Enter this 6th day of May, 1976.

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

TRIAL

TRANSCRIPT OF PROCEEDINGS

CONDUCTED MAY 28, 1976

PRESENT:

FOR THE PEOPLE OF THE STATE OF ILLINOIS:

GERRY L. DONDANVILLE
State's Attorney, By
DONALD C. HUDSON
Assistant State's Attorney

FOR THE DEFENDANT

HERBERT HILL
Attorney at Law

[R-58] THE COURT: This matter comes on for trial. State ready?

MR. HUDSON: State is ready, Your Honor.

THE COURT: You are?

MR. HUDSON: Well, with the exception of one thing. It's come to my attention we cannot get the lab technician, Judge, and I think at this time I'd have to request a continuance under Section 114-4 (c) (2) of the Illinois Revised Statutes, Code of Criminal Procedure. The chemist, Judge, is unavailable. That would be a material witness for the State. I'd have to move for a continuance of this matter for another short date.

MR. HILL: Your Honor, we would object to any continuance at this time. If the State is moving for the continuance based on the fact that the corroborating witness is unavailable with respect to the substance that was analyzed, we would stipulate the substance was heroin.

THE COURT: The motion for continuance is denied, stipulation received.

MR. HUDSON: Let me see if I understand the scope of the stipulation by Counsel.

The six tinfoil packets that Agent Johnson removed from Mr. Ybarra, taken to the lab by him, were [R-59] in fact heroin, and the substance which he then picked up from the lab, assuming we can lay the chain of custody to the lab and back, you would stipulate were in fact heroin?

MR. HILL: That's correct.

THE COURT: That's what the evidence would show if that witness were called to testify?

MR. HUDSON: Yes.

THE COURT: All right.

JEROME JOHNSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUDSON:

Q Sir, will you tell us your name and spell it for the Reporter?

A Jerome Johnson, J-o-h-n-s-o-n.

Q What is your business or profession?

A I'm presently employed with the Illinois Bureau of Investigation as a Special Agent.

Q How long have you been employed in that capacity?

A Approximately three and a half years.

Q Okay. Are you presently assigned to any particular [R-60] division of the Illinois Bureau of Investigation?

A Yes, I am.

Q What would that be?

A Joliet Narcotics Division.

Q Calling your attention to March 1st, 1976, aproximately 4:25 on that date were you employed and engaged

in your occupation as a Special Agent for the Illinois Bureau of Investigation?

A Yes, I was.

Q Do you recall where you were located at that time?

A In the area of Aurora, Illinois, precisely the Aurora Tap.

Q Is the Aurora Tap you are speaking of located in Kane County, Illinois, City of Aurora?

A Yes.

Q Do you recall why you were at that location at that time?

A Yes, execute a Search Warrant.

Q And do you recall what type of a place the Aurora Tap was?

A It's a—put it plain, it's a tavern, a lounge.

Q Okay. You were there pursuant to a Search War-' rant?

[R-61] A Correct.

Q And do you recall what particular items or articles you were searching for pursuant to that Search Warrant?

A Heroin and all other narcotic paraphernalia.

Q Were there any other Officers there present at that time to assist in the execution of that Warrant?

A Yes.

Q Do you recall how many there were with you?

A Approximately. There was myself, Special Agent Moraitis, Special Agent Doster, Detective Weaver from the Aurora Police Department, and several other uniformed Officers.

Q Will you tell us, please, what if anything occurred when you arrived at the Aurora Tap on March 1st, 1976 at about 4:25?

A Upon entrance we announced our office, our purpose. We advised all the patrons to remain seated while we conducted an incursive search of all patrons.

Q Approximately how many patrons were inside the tavern at that time?

A This is another approximate guess, approximately twelve to thirteen.

Q And you said all the patrons were searched, [R-62] patted down for weapons, is that correct?

A That's correct.

Q Could you describe the interior of the tavern for us, please, if you recall?

A Well, only words—I can recall just a shabby—just like a hole in the wall, really.

Q Is this more than one room, one room or what?

A One large room, right.

Q What were the lighting conditions inside the room when you entered?

A Poor at best.

Q How many entrances and exits were there?

A One entrance, one exit.

Q Now, where were the individuals located when you entered the tavern?

A Most of the individuals were at the bar either sitting or standing.

Q Would you tell us, please, how the search for weapons was conducted?

A We advised all patrons to put their hands on the bar. We then conducted a pat down search for guns, knives, et cetera, for our own personal safety.

Q Will you tell us, please, what if anything occurred after the pat down search?

[R-63] A I then went back and searched Mr. Ybarra for controlled substances.

Q You searched Mr. Ybarra?

A Yes.

Q Mr. Ybarra you're speaking of, do you see him in court today?

A Yes.

Q Would you point him out, indicate what he's wearing?

A Yes, sitting across the room with a blue jacket, I guess you'd call it a brown shirt, black hair, mustache.

MR. HUDSON: Your Honor, may the record reflect the in-court identification of the Defendant?

THE COURT: May so show.

BY MR. HUDSON:

Q Okay. Now, were Mr. Ybarra's hands visible to you when you first observed him?
A Yes.
Q Was Mr. Ybarra wearing a coat at that time?
A Yes.
Q Would you tell us how you conducted the search of Mr. Ybarra, the second search?
A The second search. He already had his hands on the bar. I started from his neck and patted him down from, [R-64] say, his neck down to his toes.
Q What if anything occurred during the course of that pat down search?
A I felt objects in his pocket which I believed—
MR. HILL: Objection to what he believed, Your Honor.

BY MR. HUDSON:

Q You'll have to testify more specifically.
Where did you feel these objects on his person?
A If my memory serves me correctly they were in his right front pants pocket.
Q What, if anything, did you then do upon feeling these objects?
A I put my hand in his pocket and extracted the substance.
Q What did you extract at that time?
A Six tinfoil packets.
Q Six tinfoil packets. Did you at that time have an occasion to examine the packets or the contents of the packets?
A Not at that particular time.
Q When did you examine the contents of the packets?
A After the place was secure, search was secure, I took the contents back to the Aurora Police Department.
Q What did the packets contain, or what was the [R-65] appearance of the substance in the packets?
A Brown powder.
Q And did you open up all the packets?
A No.

Q How many did you open?
A One.
Q And did that contain the brown powder you're talking of?
A Yes.
Q What, if anything, did you do after you removed the packets from Mr. Ybarra?
A Conducted a field test.
Q Had he been placed under arrest at this time?
A Yes, he had.
Q Where were the packets you took from Mr. Ybarra —Where did you conduct the field test at?
A Aurora Police Department.
Q Where were the packets that you removed from Mr. Ybarra before they went to the Aurora Police Department?
A Where were they?
Q Yes, where were they kept?
A In my possession.
Q And you yourself had exclusive control and custody until they were delivered to the Aurora Police [R-66] Department?
A Solely.
Q Did you conduct the field test yourself?
A Yes.
Q How did you do that?
A By taking a portion of the substance and putting it in a chemical vial which gives off a certain color for opiates, and it reacted positively for heroin.
Q What, if anything, did you do after that with the tinfoil packets?
A Processed the evidence in cellophane bag, initialed it, kept it my briefcase over night and the next morning transported it to the Joilet Bureau of Identification for analysis.
Q Backing up for a second, did you have an occasion to weigh the contents of those tinfoil packets?
A Yes.
Q Do you recall what the weight was?
A Approximately 2.1 grams.

THE COURT: Per packet or total?
THE WITNESS: Total.

BY MR. HUDSON:

Q You say you kept them in your custody over night?
[R-67] A That's correct.
Q And where were they kept?
A In my briefcase.
Q That locked?
A Yes.
Q Where did you keep the briefcase over night?
A In my residence.
Q Did anyone else have access to the briefcase?
A None whatsoever.
Q You had it in your exclusive control and custody?
A Yes.
Q What, if anything, did you do with the cellophane bag and tinfoil packets the next day?
A Delivered to the Bureau in Joliet.
Q What condition was the bag when you delivered it there?
A Sealed.
Q Did you in fact bring the evidence with you?
A Yes, I did.
Q May I see it please?
Will the Court Reporter mark this plastic bag as People's Exhibit No. 1 for identification?

(Exhibit marked as requested.)

BY MR. HUDSON:

[R-68] Q Special Agent Johnson, I'm going to hand you what has been marked as People's Exhibit No. 1 for identification and ask you to examine that and tell me, do you recognize it?
A Yes, it's the same packet that I processed in the Aurora Police Department.
Q Is there any—Are there any particular identifying marks on that packet which cause you to remember that is in fact the same packet?

A Yes, marked on the front you see Exhibit No. 1, case number, my initials, date, and the person who witnessed it.

(Exhibit tendered to Mr. Hill.)

BY MR. HUDSON:

Q Sgt. Johnson, what is the condition of the bag at this time?
A The condition of the bag is sealed.
Q Sealed. Is it in fact in the same condition as it was when you delivered it to the lab on March 2nd?
A No, it's not.
Q What, if anything, is different about that bag?
A For purposes of the analysis they had to open it, and here they have brown tape and some kind of orange sticker. That's the only difference.
[R-69] Q Okay. Other than that then, other than the fact it has a different sticker on it and the initials, is it in fact in the same condition as it was on March 1st when you placed the tinfoil packets into it and in fact sealed this bag closed?
A Yes, it is.
Q Would you open that up, please?
THE COURT: Do you want it opened?
MR. HUDSON: Is it necessary?
MR. HILL: It isn't. We have stipulated to the fact the substance is heroin.
THE COURT: Let the record show then we can admit it.
MR. HILL: I have no objection.
MR. HUDSON: I move, Your Honor, to have the identification marks stricken and the plastic bag and contents admitted as People's Exhibit 1 for identification.
THE COURT: Okay. We'll give leave to the State to withdraw it right back to the Agent. Any objection to that?
MR. HILL: No objection.
MR. HUDSON: No objection. I take it our stipulation covered the chain back to the Court, or do you want me to go into that?

MR. HILL: That's fine. We'd stipulate.
[R-70] MR. HUDSON: Stipulate the proper chain has been preserved?
MR. HILL: Yes.

BY MR. HUDSON:

Q Everything you told the Court occurred in Kane County, Illinois?
A Yes.
MR. HUDSON: I have no further questions, Your Honor.
THE COURT: Cross.

CROSS EXAMINATION

BY MR. HILL:

Q Investigator Johnson, you indicated previously that you had been employed as an Investigator for the Illinois Bureau of Investigation approximately three and a half years, is that correct?
A Correct.
Q During the course of that time did you ever as an Investigator for the Illinois Bureau of Investigation have occasion to come into contact with one Venturn E. Ybarra?
A Yes.
Q Prior to March 1st, 1976?
A No.
[R-71] Q You have never seen him before?
A Correct.
Q And you went to a location in the City of Aurora known as the Aurora Tavern for the purposes of executing a Search Warrant?
A That's correct.
Q And did the Search Warrant indicate what premises were supposed to have been searched pursuant to that Warrant?
A Yes, it did.
Q What did it say?
A Without having the Warrant before me, I believe it's 7900 South LaSalle, the Aurora Tap.

Q And simply described, the premises at 79 South LaSalle, commonly known as the Aurora Tavern?
A Restate your question, I don't understand.
Q Commonly known as the Aurora Tavern?
A Yes.
Q Did it describe the person of any particular individual that you were supposed to search pursuant to that Warrant?
A I believe it did.
Q Do you recall at this time who that individual might have been?
[R-72] A No, I don't.
MR. HILL: May it please the Court, may I see the file for purposes—off the record.
THE COURT: Off the record.

(Whereupon a discussion was had between Court and Counsel off the record, after which the trial in said cause proceeded as follows:)

BY MR. HILL:

Q Would the Court Reporter mark that as Defendant's Exhibit 1 for identification?

(Exhibit marked as requested.)

BY MR. HILL:

Q Investigator Johnson, I show you what has previously been marked as Defendant's Exhibit 1 for identification and ask if you are familiar with that document?
A Well, vaguely, yes. I didn't draw up the Search Warrant or sign it.
Q What does it purport to be?
A A Search Warrant.
Q For what?
MR. HUDSON: Your Honor, I'll object. I think the [R-73] document speaks for itself.
THE COURT: You'd stipulate the document speaks for itself? You'd stipulate that is a copy of the Search Warrant?
MR. HUDSON: Yes.

MR. HILL: Would you prefer to stipulate the document has no relationship, bears no indication of search pursuant to the person of Mr. Ybarra?

MR. HUDSON: No, I'd stipulate the document is a Search Warrant.

THE COURT: And speaks for itself.

MR. HILL: We move it be admitted in evidence as Defendant's Exhibit 1.

THE COURT: No objection?

MR. HUDSON: No objection.

THE COURT: It may be admitted. We'd normally wait for the Defendant's case, but we'll do it now. Identification marks may be stricken.

(Whereupon said exhibit, marked Defendant's Exhibit No. 1, so offered and received in evidence, is made a part hereof:)

* * * *

[R-75] BY MR. HILL:

Q I understand that you arrived at the Aurora Tavern on the 1st of March, 1976 at approximately 4:10 p.m.?

A Approximately.

Q For the purposes of searching those premises?

A Correct.

Q And the person of one Greg who is identified in the Warrant as the bartender?

A If that's what it says, correct.

Q And at the time that you arrived at that location there was approximately twelve to thirteen patrons sitting in the bar?

A Correct.

Q To the best of your knowledge do you know whether or not the Aurora Tavern is a public establishment?

A To the best of my knowledge.

Q Open to the public?

A Right.

Q And invites people in from the street?

MR. HUDSON: Objection, that calls for a conclusion. I think it's a public place, that's all we need.

MR. HILL: Fine.

BY MR. HILL:

[R-76] Q You described the lighting as dim, is that correct?

A Correct.

Q Were you able to observe Mr. Ybarra when you walked into the tavern?

A Yes.

Q Where was Mr. Ybarra when you first entered the tavern?

A He was to my immediate left at the head of the bar.

Q Was he standing at the bar?

A Yes.

Q He was standing there along with other patrons?

A Yes, beside of the patrons. I don't know if he was with 'em.

Q Were you in a position to notice Mr. Ybarra as he was standing next to the other people?

A Was I in a position to what?

Q To observe Mr. Ybarra.

A Not fully. I mean I could see his back, his back was facing me.

Q Were you able to observe his hands?

A No, not really.

Q Were you able to observe his clothing?

[R-77] A Like I say, his back was to me.

Q Do you know what kind of coat or jacket Mr. Ybarra was wearing?

A Yes.

Q What kind of coat or jacket was that?

A It's a three-quarter gray with black stripe lumber type jacket.

Q As you first observed Mr. Ybarra did you notice anything protruding from his coat pocket?

A No.

Q Anything protruding from his pants pocket?

A No.

Q Did you notice anything about his person that would give you the impression of a weapon?

A No.

Q At the time that you observed Mr. Ybarra, did you have any knowledge that Mr. Ybarra had committed any act violative of the Ordinance of the City of Aurora?
A No.
Q At the time that you first observed him, did you notice or did you have knowledge as to whether or not Mr. Ybarra committed any act violative of the Statutes of the State of Illinois?
A I had no such knowledge.
[R-78] Q At the time you observed him did you notice that he had committed any act violative of any Federal Statute?
A No.
Q To the best of your knowledge he had done nothing wrong?
A Correct.
Q And thereafter you submitted Mr. Ybarra to a search?
A Yes.
Q I understand from your prior testimony this search was a cursory search for weapons?
A Correct.
Q Did you find any weapon upon the person of Mr. Ybarra?
A No, I did not.
Q And thereafter you continued to search other patrons?
A Correct.
Q Was Mr. Ybarra in your view at that time?
A At what time?
Q At the time you were searching the other patrons?
A No.
Q Did you at any time observe Mr. Ybarra attempt [R-79] to do anything with his hands, hide anything?
A I didn't, no.
Q Did you see Mr. Ybarra move toward any of the other patrons?
A No.
Q Did you at any time observe him move from the location where he was?
A No.

Q How long did it take for you to search the other patrons?
A Again, approximately maybe ten minutes.
Q And within that time Mr. Ybarra was in your view?
A No.
Q He was not in your view?
A No.
Q You returned to search Mr. Ybarra again?
A Correct.
Q Did you observe a weapon on him at that time?
A No.
Q Did you have any knowledge that he committed an offense at that time—
A No.
Q (continuing)—of either a State, local or [R-80] Federal Statute?
A No, I didn't.
Q And you submitted him to a search again?
A Correct.
Q For weapons?
A No.
Q Did you have any knowledge that he had anything upon his person that was violative of any Statute?
A No.
Q And after this search did you submit Mr. Ybarra to a third search?
A No.
Q You only searched Mr. Ybarra twice?
A Correct.
Q Did you search any of the other patrons in the establishment a second time?
A I personally? No.
Q You mentioned, Investigator Johnson, that the establishment was a fairly small room—or large room, which one was it?
A Large.
Q Large room. And there was one entrance and one exit?
A Correct.

[R-81] Q Was there any one of the Officers with you standing in front of that exit?
A Yes.
Q So none of the patrons were permitted to leave?
A Not after they had been searched, no.
Q Prior to the time they were searched was there anyone standing in front of the door?
A Yes.
Q Prohibiting anybody from leaving?
A Leaving or entering.
Q Prior to the time that you searched Mr. Ybarra the first time did you tell him at that point he was under arrest?
A No.
Q Prior to the time he was searched on the second occasion did you indicate to him that he was under arrest?
A No.
Q And you had no knowledge that he committed any offense?
A Correct.
Q Even following your first search?
A Correct.
Q I take it upon the second search you recovered certain materials from his pocket?
[R-82] A That's correct.
MR. HILL: I have no further questions.
MR. HUDSON: Just a couple, Judge.

REDIRECT EXAMINATION

BY MR. HUDSON:

Q Special Agent Johnson, on the occasion of the second search did you pat Mr. Ybarra down first before you felt these objects?
A Oh, yes.
Q You didn't go right into his pocket, is that correct?
A Correct.

Q Did you have him in your constant visual observation between the time of the first search and the time of the second search?
A No.
MR. HUDSON: I have no other questions.
MR. HILL: No questions, Your Honor.
THE COURT: Okay. Does the State have any other witnesses?
MR. HUDSON: No, Your Honor.
THE COURT: You rest?
MR. HUDSON: State rests.
MR. HILL: Defense rests, Your Honor—oh, no, I'd [R-83] like to put Mr. Ybarra on.

VENTURA E. YBARRA,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

Q Would you state your name and spell your last name for the Court Reporter, please?
A Ventura E. Ybarra, Y-b-a-r-r-a.
Q Mr. Ybarra, did you have occasion to be at or near the Aurora Tavern on or about the first day of March, 1976 at approximately 4:10 p.m.?
A Yes?
Q At that occasion did you have occasion to submit or—strike that. Did you have occasion to be searched while you were there?
A Yes, I was.
Q Are you familiar with the Aurora Tavern?
A Yes.
Q Is that a public or private place, Mr. Ybarra?
A It's public.
Q And you were there along with other patrons?
A Yes.

[R-84] Q There was no private setting going on?
A No.
Q You were standing at the bar when the police came in?
A Yes.
Q Did anyone at any time tell you that you were under arrest prior to searching your person?
A No.
Q How many times were you searched?
A Three times.
Q Do you recall what Officer, if any of them, searched you?
A Yes.
Q Which one?
A This one. (Indicating.)
MR. HILL: Let the record reflect the witness refers to Investigator Johnson.
THE COURT: It may so indicate.

BY MR. HILL:

Q The first time that you were approached by Mr. Johnson, what, if anything, did he say to you?
A He just told me put my hands up on the bar, keep looking straight ahead, and just searched me.
Q Did you move in any direction toward Mr. Johnson [R-85] prior to him searching you?
A No.
Q Did you have any weapons about yourself?
A No.
Q Did you point any weapons in his direction?
A No.
Q Were you carrying a gun or knife?
A No.
Q Did you make any noises prior to the time he searched you?
A No.
Q And you submitted to that search, is that correct?
A Yes.
Q He searched you, is that right?
A Right.

Q And did he find anything upon searching you the first time?
A No.
Q And what, if anything, did you do after that?
A What did he do?
Q What did you do?
A Nothing. He told me to keep my hands on the bar, keep looking straight—
[R-86] Q And did you keep your hands on the bar?
A Yes.
Q Did you at any time remove your hands from the bar?
A No.
Q Did you touch any of the other patrons that were near you?
A No.
Q Did you touch any of the police officers?
A No.
Q Did you go toward any of them?
A No.
Q Did you move in any way from where you were standing?
A No.
Q And approximately ten minutes later Investigator Johnson came back to search you again, is that correct?
A Right.
Q And what happened with respect to that search?
A Well, he searched me several times. First time he searched me, he came back, checked my boots, left again, he came back and he gave me another search.
Q And the second time he came back to search you he requested that you take off your shoes?
[R-87] A No, just pulled my bells and rubbed his fingers around my boots.
Q Did he find anything around your boots or pants?
A No.
Q He left at that time, is that correct?
A Yes.
Q Did he search any other patrons following that second search?
A Yes.

Q And he returned to you again, is that correct?
A Yes.
Q Did you move from your position where you were standing following the second search?
A No, because he had told another officer to keep an eye on me.
Q Did you move your hands from the position of the bar where they were?
A No.
Q Were your hands flat on the bar?
A Yes.
Q They were not under the bar hiding anything?
A No.
Q Did you have anything in your hands at that time?
[R-88] A No.
Q And subsequently Mr. Johnson came back and searched you a third time?
A Correct.
Q How did he search you then?
A He patted me down. He was patting my pocket and then went into my pockets.
Q And he removed then certain items?
A Yes.
MR. HILL: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. HUDSON:

Q Mr. Ybarra, when you say he searched you the first time, do you mean he patted you down or searched your pockets?
A He patted me down.
Q Then when he came back and patted you down a second time he did pat you down first before he went in your pockets?
A Yes.
Q And then he removed six tinfoil packets from your person, is that correct?
A Yes.

[R-89] MR. HUDSON: I have no other questions, Judge.
MR. HILL: No further questions. Defense rests, Your Honor.
THE COURT: Okay. Any statements for the record?
MR. HUDSON: Judge, I'd make a brief closing argument.
I think the evidence has certainly shown here beyond a reasonable doubt Mr. Ybarra did in fact possess six tinfoil packets which contained substance in the amount of 2.1 grams of heroin.
I think any questions as to the scope or legality of the search were properly ruled on by the Court in a motion to suppress.
I think the evidence certainly sustains he's guilty of possession, unlawful possession of a controlled substance, that being heroin.
MR. HILL: In response, Your Honor, I'd like to offer and reiterate on behalf of this Defendant our motion to dismiss this matter and to dismiss the matter based on the fact that the search conducted of the person of Mr. Ybarra was unconstitutional and in violation of the Fourth Amendment, against unreasonable search, and I would submit to the Court in support of that motion the case of People vs. Hering, 318 N.E. 2d 575—strike that, 757, in which the Court indicated that a search conducted [R-90] without a Warrant is per se unreasonable and subject only—or per se unreasonable subject only to a few specifically established exceptions, those exceptions are established or primarily well defined exceptions and all within the area of a frisk based on probable cause that either a crime had been committed, that a crime was being committed or that a crime was about to be committed.
I think the testimony that has come from Investigator Johnson with respect to Mr. Ybarra's presence at the Aurora Tavern or his knowledge of Mr. Ybarra prior to going to the Aurora Tavern seems to suggest that Mr. Ybarra had done nothing that was violative of any statute or ordinance or Federal statute showing that he had

committed any crime, or was about to commit any crime, or that any crime had been committed by Mr. Ybarra.

I'd like to direct the Court's attention to the fact that while Investigator Johnson was at the Aurora Tavern pursuant to the issuance of a Search Warrant, which was not contested within this matter, the Warrant specifically described the premises at 79 South LaSale Street within the City of Aurora. Those premises, as far as the evidence reflects, represents a public establishment open to the public and inviting people in generally. It also related to the search of a particular person described [R-91] in the Search Warrant as being Greg. I do not believe that under those circumstances the Investigators from the Illinois Bureau of Investigation, the Aurora Police Department, or any other law enforcement agency as far as that goes, would have the carte blanche authority to go into such an establishment and for the purposes of conducting a generalized search submit all of the patrons that are there to an intrusion upon their privacy, and I think that is exactly what Investigator Johnson has testified to.

He has suggested that Mr. Ybarra did nothing wrong, was not in violation of any statute or ordinance, et cetera, and that his first search reflected the fact that there were no weapons upon him.

Now, the cases as far as search and seizure are concerned suggest that if there is to be a frisk, and I submit to the Court that this particular situation falls within the area of a frisk pursuant to People vs. Felton, 318 N.E. 2d 642 (20 Ill. App. 3d 103), in that even though a Warrant had been obtained, the Felton case suggests that in the absence of a showing of probable cause to search the principles limiting the search under stop and frisk are controlling in that particular kind of situation.

I don't believe there's any need to reiterate [R-92] the fact there is no probable cause here, and pursuant to Felton this kind of situation is limited to a stop and frisk.

In Felton the Court held that three restrictions are placed on the right of policemen to stop and frisk individuals suspected of criminal acts, and I point out to the Court this is with respect to people who are suspected of criminal acts. Here we have a Defendant who is not even suspected.

First, the Court says the stop itself must be reasonably—must be justified by specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the intrusion. Our testimony with respect to Investigator Johnson discards anything articulable about the search with Mr. Ybarra.

Secondly, assuming a valid stop, a limited search of the suspect for weapons is justified only if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. There was no testimony with respect to any danger imminating to Mr. Johnson. He testified he found no weapons on him. He testified that the apparel which Mr. Ybarra was clothed in at that particular time made no suggestion of any weapons about his person or [R-93] that there was any in any close proximity to him.

Thirdly, an authorized search is confined in scope to an intrusion reasonably designed to discover objects capable of use as weapons.

Now, Investigator Johnson indicated he found no weapon, and yet after ceasing the initial search he goes about his business to search other patrons perhaps on a theory of a cursory search for weapons as he testifies, and he subsequently comes back and he submits Mr. Ybarra to another pat down, which at this point we maintain is certainly a most unreasonable search and certainly violative of the Fourth Amendments rights to have this Defendant's right to protection under the Fourth Amendment.

Furthermore, Felton held that a search—

THE COURT: Didn't you mention this case in the Motion to Suppress?

MR. HILL: I did. I'm simply reiterating.

THE COURT: Can't you leave your argument there stand for your arguments now, or do you feel to protect your record you have to read it all in?

MR. HILL: I would feel I should.

THE COURT: Okay. Go ahead.

MR. HILL: The Court held that a search may not precede an arrest and serve as part of its justification, [R-94] or even looks, gestures, movements taken alone are insufficient to constitute probable cause to search since they in fact may be consistent with innocence. It is only when the furtive gestures are coupled with other circumstances tending to show probable cause that the suspicious movement will be included in the basis for finding probable cause for a search.

But we have no indication in this record at all indicative of any kind of movements, gestures or otherwise that would suggest that Investigator Johnson should have pursued the second, and as Mr. Ybarra testifies, to yet a third intrusion upon his privacy without probable cause and without any basis to assume that Mr. Ybarra committed an offense.

We think, Your Honor, that People vs. Felton and People vs. Harshbarger, 321 N.E. 2d 183, and People vs. Ortiz, 16 Ill. App. 3d are controlling in this situation, and that the Court should not allow a judgment to be entered affecting the rights of Mr. Ybarra as a result of evidence obtained pursuant to an illegal search.

MR. HUDSON: A couple brief comments.

Mr. Hill said nothing. At this stage we have had a trial as to the guilt or innocence of the Defendant. Once again I submit the evidence clearly established his [R-95] guilt of the offense charged.

The arguments which I presented at the Motion to Suppress I would rely on again at this time, but I would merely reiterate for the record the two cases which I presented to the Court at that time for its consideration which are dispositive of the legality of this type of search pursuant to a Search Warrant, that would be People vs. Pugh, cited at 217 N.E. 2d 557, a 1966 case out of the First District, and also People vs. Kielczynski, 264 N.E. 2d 767, a 1970 case out of the First District. I believe those cases are dispositive as to the legality of the search.

THE COURT: All right. In regard to the motion, first of all, if that in effect is a reiteration of the motion, I do not agree as a matter of fact that there is no probable cause to search the Defendant consistent with those cases that you just cited. Certainly to say that there was no probable cause would be a conclusion, and that would have to stand on the facts in the case and not what any agent thought or what anyone thought it would be what the facts were, and in line with those cases that it is reasonable to search people in that situation, I never intended to make a finding there was not probable cause to search, but still I have to limit [R-96] it between the framework of the cases the State cited. Motion denied, finding will be guilty.

This is a second class—

MR. HUDSON: This would be a third class, Judge, it's under 30 grams.

THE COURT: Third class. He has a right to apply for probation. He has a right to a hearing in aggravation-mitigation. I take it you wish to avail yourself of those rights, Mr. Hill?

MR. HILL: Yes, we do, Your Honor.

THE COURT: So, let's set that for Friday, June 25th. Is that a good date?

MR. HILL: In the afternoon?

THE COURT: Then the hearing in aggravation-mitigation and application for probation will be June—what did I say, June 25th?

MR. HILL: Yes.

THE COURT: And any post trial motions that are then pending.

MR. HILL: All right.

MR. HUDSON: Is that 9:30?

THE COURT: Yes.

(Which were all the proceedings had at the hearing in said cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

VENTURA E. YBARRA, DEFENDANT

ORDER

ENTERED MAY 28, 1976

This matter having come on for trial, the defendant having waived his right to a trial by jury and consenting to a bench trial, the Court having heard all of the evidence presented, and the arguments of counsel, the Court finding the defendant guilty of the Unlawful Possession of a Controlled Substance as charged in the indictment:

It is hereby ordered that:

June 25, 1976 at 11:00 a.m. is hereby set for a hearing in aggravation and mitigation; return of pre-sentence investigation and the defendant's application for probation and for sentencing.

/s/ _____
JOHN A. KRAUSE
Judge

Enter this 28th day of May, 1976

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

POST-TRIAL MOTION

FILED JUNE 28, 1976

[CAPTION OMITTED IN PRINTING]

NOW COMES defendant, Ventura A. Ybarra, by Herbert Hill, his attorney, and moves the Court for the entry of an Order reversing and setting aside its prior finding of defendant's guilt, or in the alternative, allow said defendant a new trial, and as grounds therefore, alleges and states as follows:

(1) That certain evidence herein was improperly admitted, and that said evidence should have been suppressed;

(2) That it was error to deny defendant's Motion to Suppress said evidence.

WHEREFORE, defendant, Ventura E. Ybarra, prays that said judgment be reversed and set aside, or in the alternative that defendant be granted a new trial.

Respectfully submitted,

/s/ Herbert Hill
Attorney for Defendant

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

HEARING ON POST-TRIAL MOTION
AND ON SENTENCING

TRANSCRIPT OF PROCEEDINGS

CONDUCTED JUNE 28, 1976

PRESENT: FOR THE PEOPLE OF THE
STATE OF ILLINOIS:

GERRY L. DONDANVILLE
STATE'S ATTORNEY, BY

DONALD C. HUDSON
ASSISTANT STATE'S ATTORNEY

FOR THE DEFENDANT

HERBERT HILL
ATTORNEY AT LAW

[R-100] MR. HUDSON: Your Honor, coming before the Court now in case No. 76 CF 9101 is entitled The People vs. Ventura E. Ybarra, Y-b-a-r-r-a. In this cause the Defendant was indicted on a single Count Indictment charging the Defendant with unlawful possession of a controlled substance, that being heroin, in an amount less than 30 grams, being a Class Three Felony.

Let the record reflect in this cause that on May 6, 1976, the Defendant filed a motion to suppress physical evidence. That motion was denied and matter continued to May 28th for trial. On that date a trial was held, bench trial, and the Defendant was found guilty of the offense as charged.

The matter came on this morning set for sentencing. The record should reflect Mr. Ybarra is present before the Court represented by Mr. Hill. Mr. Hill just filed, apparently, I have just seen, a Post Trial Motion asking

the Court to reconsider its finding of guilty, and that it was error to deny the Defendant's Motion to Suppress evidence.

I have not had a chance to consider this motion, but I think I would waive prior notice. I'd be prepared to argue any grounds at this time.

THE COURT: Do you want to proceed on the Motion?

[R-101] MR. HILL: Your Honor, in light of the fact that the Motion has been raised prior to trial and again at the trial level, the Defendant would respectfully waive any argument and simply stand—

THE COURT: Stand on the former arguments?

MR. HILL: Yes.

THE COURT: All right. The Motion will be denied.

MR. HUDSON: Judge, as regards the sentencing in this case, the Probation Department has returned a presentence investigation, which I believe the Court has had the opportunity to consider, recommending probation. The position of the State is while we do not feel that's an inappropriate recommendation, if the Court would see fit to grant probation we'd ask it be a formal reporting probation in which the Defendant would be required as a condition to continue his treatment in the Aurora Drug Area Abuse Program.

The Defendant is eligible for 1410, but because of the fact he's undergoing treatment we think it would be best for himself as well as the interest of justice if the probation is granted but the Court require him to report and continue his treatment.

MR. HILL: Your Honor, the defense would obviously concur in the recommendation of the State with respect to [R-102] the probation. However, if the Court should see fit to grant this Defendant probation I'd like the Court to consider the fact that he's now currently under a drug rehabilitation program of the City of Chicago, and if the Court should require that he make some kind of formal reporting to the Court that it do so at an interval that would not obstruct the other program.

I understand from the people there it's kind of diffi-

cult to get him back and forth from Cook into Kane County for appointments here.

THE COURT: Where does he have to go for the program?

THE DEFENDANT: Chicago.

THE COURT: Safari House?

THE DEFENDANT: Right.

MR. HILL: It's kind of a live-in arrangement?

THE DEFENDANT: Right.

THE COURT: I would think if he would mail his report and the Probation Officer could call in there once and awhile and talk to him on the phone at Safari House and talk to the people there that would be enough control.

How long will this program go on at Safari House?

MR. HILL: I think it's a nine month program, isn't it?

[R-103] THE DEFENDANT: It's volunteer. I volunteer. I volunteered.

THE COURT: You don't know how long it is?

THE DEFENDANT: No.

THE COURT: Are you on methadone now?

THE DEFENDANT: Yes.

THE COURT: They try to get you away from that over a period of time?

THE DEFENDANT: Yes.

THE COURT: Until you don't need anything?

THE DEFENDANT: Right.

THE COURT: Is that your goal, is that what you want to do?

THE DEFENDANT: Yes.

MR. HILL: I think, Your Honor, from my understanding and talking with Miss Erma Cunningham, who is involved in that program, that even though it might be of a voluntary nature once there is an admission into the program the person has to stay for at least a six to nine month period, and I think Mr. Ybarra has been there since April?

THE DEFENDANT: April 3rd.

MR. HUDSON: I'd require it be a mandatory condition that he not—that he be required to participate in the program and complete it rather than having a

voluntary status, if he wants to go, fine, if he doesn't, he doesn't. [R-104] I think it should be a specific condition of probation if it's granted.

THE COURT: What else do you do while you're there in Safari House?

THE DEFENDANT: Well, this morning like therapy orientation type thing.

THE COURT: Can you finish—get your G.E.D. while you're there?

THE DEFENDANT: Yes.

THE COURT: Are you going to work on that?

THE DEFENDANT: Well, I was working, see if I could get a job more before I go into that because I got financial problems at home. They'll allow you to have a certain period of time to go out and look for a job.

THE COURT: Does anyone else have anything else to say?

MR. HILL: No, Your Honor.

THE COURT: All right. Based on the probation report which everybody's had a chance to look at and consider, and pursuant to the finding of guilty after a trial stemming from a Indictment was it?

MR. HUDSON: Yes.

THE COURT: (continuing)—the Court will sentence the Defendant to a period of two years probation, that he [R-105] stay enrolled in the drug rehabilitation program.

Now, I take it that if they want to transfer him somewhere but he's still under the drug abuse program that's all right. Is Miss Cunningham who you work with?

THE DEFENDANT: Yes.

THE COURT: I'm not saying Safari House, but wherever they put him as long as he's enrolled in the program.

MR. HILL: So that if it becomes possible that he move to Texas where the remaining portion of his family is—

THE COURT: He can transfer his probation.

MR. HILL: To anywhere as long as there's a program?

THE COURT: As long as there's a program he can be involved in until some program official represents to the Court that he's cured.

MR. HILL: Fine. Is that with periodic reports from the Program Director?

THE COURT: Periodic reports from the Defendant and the Probation Office may make its arrangements with the Program Director as to how they stay in contact. I want the Probation Department to stay in contact with the Program Director. Whether they initiate it or the Program Director initiates it they can work that out.

Then payment of costs. Does he have a bond up?

[R-106] MR. HILL: No.

THE COURT: During the term of the probation. That's what you want to do, Mr. Ybarra, is that correct?

THE DEFENDANT: Yes.

THE COURT: Because if you don't want to do this program then it's not going to do any good.

THE DEFENDANT: The thing is like more—I'd like to leave back to Texas, as I have family down there.

THE COURT: You have to get the Texas authorities to take you, see what I mean?

THE DEFENDANT: Yes.

THE COURT: Then you've got to make arrangements to get in a drug abuse program that we can keep track that you follow through on this, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Then you also understand, of course, that your conviction could be appealed within 30 days, you ask the Clerk of the Court to file a Notice of Appeal, or your attorney. If you don't have funds the Court will appoint an attorney for you, and if you're without funds the Court will make available a record of this and all the other proceedings without costs to you. Do you understand those rights?

THE DEFENDANT: No, Your Honor.

[R-107] THE COURT: Mr. Hill, do you want to talk to him?

MR. HILL: Yes, Your Honor. It's his intention to appeal, and he does not have funds to employ private Counsel for that purpose and would ask the Court at this time to appoint the Office of the Appellate Public Defender to represent him in this appeal.

THE COURT: Mr. Ybarra, you're not employed at this time, is that correct?

THE DEFENDANT: No.

THE COURT: You have no bank account?

THE DEFENDANT: No.

THE COURT: And you have no savings?

THE DEFENDANT: No.

THE COURT: Do you own a car?

THE DEFENDANT: No.

THE COURT: So essentially what you own are the clothes on your back and a few personal items, right?

THE DEFENDANT: Right.

THE COURT: Let the record show the Court finds he's a proper subject for the Appellate Defender. And who will notify the Appellate Defender?

MR. HILL: I will.

THE COURT: All right.

MR. HUDSON: I'll draw an order to that effect.

[R-108] THE COURT: So you understand now we are appointing the Appellate Defender to take an appeal for you from this case, you understand that?

THE DEFENDANT: Yes.

THE COURT: And due to the fact you're indigent, or you don't have any money, this is all going to be done for you, you don't need any more money, do you understand that?

THE DEFENDANT: All right.

(Which were all of the proceedings had at the hearing in said cause.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT,
KANE COUNTY, ILLINOIS

No. 76-CF-9101

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

VENTURA E. YBARRA, DEFENDANT

JUDGMENT ORDER

ENTERED JUNE 28, 1976

[CAPTION OMITTED IN PRINTING]

This case comes on to be heard for sentencing. Defendant is present in person and by counsel. The Court has considered the pre-sentence investigation report filed herein, together with the evidence and arguments. The Defendant has been allowed an opportunity to make a statement in his behalf.

The above-named defendant has been heretofore adjudicated Guilty of the Crime of Unlawful Possession of a Controlled Substance, a Class 3 Felony.

IT IS ORDERED:

1. That the defendant's application for probation or conditional discharge is allowed, and

Defendant is sentenced to probation under the supervision of the Probation Officer for a term of 24 months, comencing this date.

* * * *

/s/ _____
JOHN A. KRAUSE
Judge

Enter this 28th day of June, 1976

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

—*vs.*—

VENTURA YBARRA, DEFENDANT-APPELLANT

Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

OPINION

FILED FEBRUARY 9, 1978

Mr. JUSTICE GUILD delivered the opinion of the court:

Defendant Ventura E. Ybarra, in a bench trial, was found guilty of unlawful possession of a controlled substance and sentenced to two years probation under the condition that he continue with his treatment under the Drug Abuse Program. Pursuant to leave granted, the Illinois State Police, Department of Law Enforcement, has filed an amicus curiae brief herein.

The sole question presented is whether the search of the patrons of a bar was in violation of the Fourth Amendment.

On March 1, 1976, agents of the Illinois Bureau of Investigation, together with police officers from the city of Aurora, pursuant to a search warrant, went to the Aurora Tap seeking "evidence of the offense of possession of a controlled substance to be seized therefrom: heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." When the officers arrived at the Aurora Tap, described as a dismal, drab and shabby type establish-

ment consisting of one room, there were 12 patrons present. The premises were searched, as well as the patrons. In the first patdown of the defendant at the bar a cigarette package with objects in it was felt by the officer. Within a few minutes the officer again searched the person of the defendant and found six tinfoil packs of heroin.

No objection is made to the warrant itself. The issue raised by the defendant is that, in the execution of such warrant, the persons in a public place such as this may not be searched. The defendant argues that the heroin found upon his person was the fruit of an illegal search since he was not named in the warrant and was in a public place and, therefore, it was erroneously admitted into evidence. The motion to suppress this evidence was made prior to trial and denied. The authority for the search herein is found is section 108-9 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 108-9), which reads as follows:

> "In the execution of the warrant the person executing the same may reasonably detain the search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

In substance, the defendant contends the provision of this statute providing that the person executing the warrant may search any person in the place at the time to prevent the disposal of articles or things described in the warrant is a violation of the Fourth Amendment. A similar statute is found in Arizona, Kansas, Georgia and the District of Columbia.

In support of his position, defendant has cited *United States* v. *Di Re* (1948), 332 U.S. 581, 587, 92 L.Ed. 210, 216, 68 S. Ct. 222, 225. We do not find that case applicable to the situation before us. The police officers in this case located, in an automobile, a party previously named by an informant, who allegedly had counterfeit

gas coupons. The defendant Di Re was a passenger in the vehicle and was searched and convicted upon the evidence seized from his person. The court in *Di Re* held that the warrantless arrest and search of defendant's person when he had committed no offense and was merely present in the vehicle was not justified. This case, involving a warrantless search of an automobile passenger, has no real bearing upon the proper application of section 108-9, which deals only with situations involving warrants. Defendant also has cited *Stanford* v. *Texas* (1965), 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506. In *Stanford* the court considered a "general warrant" which the federal courts have repeatedly held to be invalid under the Fourth Amendment. In *Stanford* the officers went to the defendant's residence and seized about half of all the books in his house and all of his personal papers, 14 cartons in all. The court held, and rightly so, that no official of the State shall ransack a person's house and seize his books and papers under the unbridled authority of a general warrant. That is not the situation in the case before us as the officers here were conducting a search in a small bar or saloon under a specific warrant for the discovery of heroin and allied paraphernalia.

The defendant has also cited *State* v. *Mendez* (1977), 115 Ariz. 367, 565 P.2d 873, which involved a statute virtually identical to ours. Defendant, who was not named in the search warrant, and not linked to the premises being searched, entered while the search was in progress. The subsequent search of his person, which revealed heroin, was found to be unreasonable. Our case is different because defendant was present when the police first arrived and thus had an opportunity to acquire or conceal the contraband, which police were searching for, upon his person.

In further support of defendant's position, counsel has cited *Willis* v. *State* (1970), 122 Ga. App. 455, 177 S.E. 2d 487, which involved a Georgia statute analogous to the Illinois statute. Defendant argues the Georgia courts do not allow the persons of those present to be searched, pursuant to a warrant for the premises, but that other

facts and circumstances making it likely that the items are being concealed by them must be present to justify the search of their persons. In *Willis* the peace officers had a search warrant for an apartemnt and, in executing the same, the court held that any person present who might reasonably be involved in the crime of possession of illegal drugs was the proper subject of the execution of the warrant. The court observed that the drugs were pills in a small container which might easily be passed from person to person. The court there stated, "we hold the search not unreasonable under Fourth Amendment standards, and authorized by the terms of the warrant." (122 Ga. App. 458-59, 177 S.E.2d 487, 489). The court's further general observation was that such a warrant would not authorize the search of someone in another part of the house; or the search of a person entering the premises such as a postman; or the search where there was no reason to believe the house was being frequented by persons illegally purchasing drugs. The latter is particularly interesting because in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs. We find *Willis* is actually supportive of the search of the defendant herein.

In this connection the observations of the Supreme Court of Washington, in *Olympia* v. *Culp* (1925), 136 Wash. 374, 377, 240 P. 360, 361-62, are pertinent.

> "Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away. The law is not so impotent as this. The officers may, under a warrant to search the premises, lawfully search any one found therein whom they have reasonable cause to believe has the articles for which the search is instituted upon his person."

Defendant further relies on the recent case of *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. In that case, the police officers were executing a search warrant of premises located on the south side of Chicago when the defendant knocked at the door and entered the apartment. An officer noticed a bulge under the defendant's coat and he was thereupon searched. That search disclosed a gun. The substance of the *Dukes* case is summed up in the court's statement that interpretation of section 108-9 of the Code of Criminal Procedure:

> "* * * in a manner permitting police officers to search anybody who happens upon premises described in the warrant during the execution of the warrant, would be to give the statute an unacceptably overbroad interpretation." (48 Ill. App. 3d 237, 241, 363 N.E.2d 62, 64.)

The court found that section 108-9 of the Code of Criminal Procedure did not authorize the search of persons,

> "* * * on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." (48 Ill. App. 3d 237, 241, 363 N.E.2d 62, 64.)

The latter phrase is controlling in the case before us. There is no doubt that the six packets of heroin herein could easily be concealed by the defendant and thus thwart the purpose of the warrant authorizing the search for heroin in the premises in question, nor do we find that the defendant was an "innocent stranger(s) having no connection with the premises" as stated in *Dukes*.

Examination of *People* v. *Pugh* (1969), 69 Ill.2d 312, 217 N.E.2d 557, discloses a case quite similar to *Dukes*. In *Dukes*, of course, the officers were conducting a search or executing a search warrant for the discovery of gambling paraphernalia while in *Pugh* the subject of the search under the warrant was for narcotics. Probably the distinguishing feature between *Pugh* and *Dukes* is that Dukes, in entering the gambling premises, was

merely a visitor, while in *Pugh* the warrant was being executed on the premises and the person of Jessie Pugh when Raymond Pugh entered. While the case does not state that Raymond Pugh was a resident of the premises, the sole issue raised in the case by Raymond Pugh was as to the search of his person. In that respect the appellate court stated, in interpreting section 108-9 of the Code of Criminal Procedure:

> "We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto the premises where the police have reason to believe narcotics are concealed provides further grounds for his search. The United States Constitution prohibits unreasonable searches (U.S. Const. amend. IV); the search of Raymond Pugh under the circumstances of this case cannot be so classified." 69 Ill. App. 2d 312, 316, 217 N.E.2d 557, 559.

In this connection the comments of Illinois Revision Committee are pertinent, *viz.*,

> "In addition, it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), *i.e.* to search the person for the things to be seized. The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * * *
>
> The committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law." Ill. Ann. Stat., ch. 38, par. 108-9, Committee Comments, at 271 (Smith-Hurd 1970).

We reiterate that each case must be decided upon the facts found therein. Such a warrant obviously would not

authorize a "blanket search" of persons or patrons found in a large retail or commercial establishment. But in the case before us the search was conducted in a one-room bar where it is obvious from the complaint of the officer seeking the search warrant that heroin was being sold or dispensed.

In *People* v. *Kielczynski* (1970), 130 Ill. App. 2d 231, 264 N.E.2d 767, we find again a case of a search warrant being issued for the search of the premises only for gambling equipment. Kielczynski owned the premises which was a gas station and in the execution of the search warrant the defendant's person was searched. Defendant's contention was that the trial court erred in denying his motion to quash the warrant and suppress the evidence. The appellate court, in considering section 108-9 of the Code of Criminal Procedure found that searches of persons on the premises have been found to be reasonable, citing *People* v. *Harrison* (1967), 83 Ill. App. 2d 90, 226 N.E. 2d 418, and *People* v. *Pugh*. The court stated,

> "We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant." 130 Ill. App. 2d 231, 238, 264 N.E.2d 767, 771.

The Supreme Court of Kansas, in *Kansas* v. *Loudermilk* (1972), 208 Kan. 893, 494 P.2d 1174, considered the statute of Kansas which was adopted from section 108-9 of the Illinois Code of Criminal Procedure verbatim, except for the deletion of the words "any instruments, articles or" found in section (b) of the Illinois statute. In the execution of a warrant, three parties were present and Loudermilk, the defendant, was searched. In the wallet of Loudermilk heroin was found. The Kansas Supreme Court found that in the execution of a search warrant under the Kansas statute the reasonable detention and search of a person found on the premises does not offend against the Fourth Amendment. The court further found that the Fourth Amendment prohibits only unreasonable searches and seizures and that the search

conducted in *Loudermilk* was not unreasonable. The court further found that the case of *Sibron* v. *New York* (1968), 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (also cited by the defendant herein), dealing with a warrantless search was not applicable to the search warrant execution situation before it. The court in *Loudermilk* concluded:

> "Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotic Drug Act." (208 Kan. 893, 898, 494 P.2d 1174, 1178).

See also *Kansas* v. *McClelland* (1974), 215 Kan. 81, 523 P.2d 357.

Probably the most closely akin case to the one before us is found in *United States* v. *Graves* (D.C. App. 1974), 315 A.2d 559. The District of Columbia code is most similar to section 108-9 of the Illinois Code of Criminal Procedure, reading, that an officer executing a warrant for the search of premises, or a vehicle, may search any person therein,

> "* * * to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person * * *" (315 A.2d 559, 560.)

In *Graves* the warrant was for the search of a delicatessen, seeking gambling paraphernalia. In the execution of the warrant there were five or six persons in the delicatessen. The patrons were searched and gambling paraphernalia was found on the person of the defendants Graves and Goldston. The court there relied upon the prior decision of the District of Columbia Court of Appeals in *United States* v. *Miller* (D.C. App. 1972), 298 A.2d 34, and held:

> "* * * the officers had sufficient grounds to search the few individuals present when the warrant was executed." (315 A.2d 559, 561.)

The District of Columbia Court of Appeals noted that such a warrant would not "authorize the search of a large number of persons present in a supermarket or other such store when there was no reason to link them to the objects of the search." (315 A.2d 559, 561). On the evidence before it, the court found:

> "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or placing it in his sock." (315 A.2d 559, 561.)

The court concluded the officers acted reasonably in searching the five or six patrons who were found in the delicatessen.

In summation, we do not find section 108-9 of the Illinois Code of Criminal Procedure to be unconstitutional in its application to the facts before us. We therefore affirm the judgment of the conviction of the defendant herein.

Affirmed.

WOODWARD and RECHENMACHER, JJ., concur.

IN THE APPELLATE COURT OF ILLINOIS
SECOND CIRCUIT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

v.

VENTURA E. YBARRA, APPELLANT

ORDER DENYING REHEARING

ENTERED APRIL 7, 1978

The petition for rehearing is denied.

LOREN J. STROTZ, Clerk

IN THE APPELLATE COURT OF ILLINOIS
SECOND CIRCUIT

No. 76-483

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

v.

VENTURA E. YBARRA, APPELLANT

CORRECTED NOTICE OF DENIAL
OF REHEARING AND CERTIFICATE
OF IMPORTANCE

ENTERED APRIL 10, 1978

The petition for rehearing or Certificate of Importance is denied.

LOREN J. STROTZ, Clerk

NOTIFICATION OF DENIAL OF PETITION
FOR LEAVE TO APPEAL BY
SUPREME COURT OF ILLINOIS

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
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SEPTEMBER 28, 1978

State Appellate Defender
130 N. Wells Street—22nd Floor
Chicago, Illinois 60606

No. 50701—People of the State of Illinois, respondent, vs. Ventura E. Ybarra, petitioner. Leave to Appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell. L. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 78-5937

VENTURA E. YBARRA, APPELLANT

v.

ILLINOIS

ON CONSIDERATION of the motion of the appellant for leave to proceed herein *in forma pauperis.*

IT IS ORDERED by this Court that the said motion be, and tne same is hereby, granted.

March 26, 1979

Mr. Justice Powell took no part in the consideration or decision of this motion.

SUPREME COURT OF THE UNITED STATES

No. 78-5937

VENTURA E. YBARRA, APPELLANT

v.

ILLINOIS

APPEAL from the Appellate Court of Illinois, Second District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 26, 1979

Mr. Justice Powell took no part in the consideration or decision of this matter.

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